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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91217562
Party	Plaintiff Uncle Sam GmbH
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Submission	Motion to Amend Pleading/Amended Pleading
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No.: 86/061,950

Mark: UNCLE SAM'S MISGUIDED CHILDREN

Published for Opposition in the *Official Gazette*: January 28, 2014

UNCLE SAM, GMBH)	
)	
Opposer)	
)	
v.)	OPPOSITION NO. 91217562
)	
JENNIFER ZVITCO)	
)	
Applicant)	
)	

MOTION TO AMEND NOTICE OF OPPOSITION

On September 8, 2014, applicant Jennifer Zvitco ("Applicant") filed a Motion to Dismiss Opposition and Incorporated Memorandum of Law (the "Motion to Dismiss") in the above-captioned proceeding. On September 11, 2014, the Board, acting in accord with Trademark Rule 2.127(d), suspended this proceeding pending disposition of Applicant's Motion to Dismiss.

In response to the pending Motion to Dismiss, opposer Uncle Sam, GmbH ("Opposer") has this day separately filed a First Amended Notice of Opposition to registration of the application noted above. Opposer's First Amended Notice of Opposition corrects the defects that Applicant alleged to have existed in Opposer's originally-filed Notice of Opposition, and Petitioner's filing now is made in accord with *Trademark Trial and Appeal Board Manual of Procedure ("TBMP")* § 503.03:

Thus, plaintiffs to proceedings before the Board ordinarily can, and often

do, respond to a motion to dismiss by filing, inter alia, an amended complaint. If the amended complaint corrects the defects noted by the defendant in its motion to dismiss, and states a claim upon which relief can be granted, the motion to dismiss normally will be moot.

Opposer states that its First Amended Notice of Opposition does state a claim upon which relief can be granted, and Opposer therefore moves that such First Amended Notice of Opposition be accepted by the Board as Opposer's operative pleading in this matter.

Applicant's Attempted Introduction of Materials Outside the Pleadings

In the Motion to Dismiss, Applicant presents an abundance of materials outside the pleadings in this proceeding, thereby effectively attempting to convert the Motion to Dismiss into a motion for summary judgment. Opposer notes that such an attempt is improper, as (i) Applicant has not filed its initial disclosures in this proceeding; and (ii) the Motion to Dismiss is not based upon issue or claim preclusion or an alleged lack of jurisdiction of the Board. Such materials thus should be excluded from consideration. *See* Fed. R. Civ. P. 12(d); *Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, 988 F.2d 1157, 26 USPQ2d 1038, 1044 (Fed. Cir. 1993) ("A movant's challenge to the sufficiency of the complaint as a matter of law, brought under 12(b)(6), is not sufficient notice that the non-movant must respond as if to a motion for summary judgment, and place material facts in dispute"); *Wells Fargo & Co. v. Lundeen & Associates*, 20 USPQ2d 1156, 1156 (TTAB 1991) (inappropriate to treat case as one for summary judgment; extrinsic matters excluded).

Applicant's Request for Oral Hearing

With regard to Applicant's request for "an oral and/or telephonic hearing on all issues" raised in the Motion to Dismiss, Opposer notes the Board's usual practice with

regard to such requests, *i.e.*:

It is the practice of the Board to deny a request for an oral hearing on a motion unless, in the opinion of the Board, an oral hearing is necessary to clarify the issue or issues to be decided. Ordinarily, arguments on a motion are, and should be, adequately presented in the briefs thereon, and therefore the Board rarely grants a request for an oral hearing on a motion.

TBMP § 502.03. Opposer does not believe that the issues presented in the Motion to Dismiss are so murky as to necessitate the holding of an oral hearing on such motion.

Conclusion

Opposer therefore moves the Board to accept the First Amended Notice of Opposition as stating a claim upon which relief may be granted, with the effect that Applicant's Motion to Dismiss shall be rendered moot.

Date: October 3, 2014

Respectfully submitted,

BALMAT LAW, PLLC

PLOEN LAW FIRM, PC

Co-counsel for Opposer

Co-counsel for Opposer

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served true and correct copies of this Motion to Amend, along with any exhibits thereto, upon the Applicant's counsel of record by mailing the same via First Class mail, postage paid, to:

Paul Ratcliffe
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and

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respectively.

Dated: October 3, 2014

SIGNED under the pains and penalties of perjury.

/Sean Ploen/
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